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No. 78-1240

In the Supreme Court of the United States

OCTOBER TERM, 1978

STAMM F. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court is reported at 424 F. Supp. 631. The opinion of the court of appeals (Pet. App. 26-28) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1978 (Pet. 1). The petition for a writ of certiorari was filed on February 9, 1979, together with a motion for leave to file it out of time and a brief in support of the motion. The petition is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service's warrantless levy upon property of petitioner's corporation for unpaid taxes by installing locks on the office entrances and

attaching warning notices on the windows invalidates petitioner's conviction under 26 U.S.C. 7212(b) for attempted forcible rescue of the property by removing the Service's locks and warning notices and installing new locks.

STATEMENT

After a nonjury trial in the United States District Court for the District of Oregon, petitioner was convicted of forcible rescue of property that had been seized by the Internal Revenue Service, in violation of 26 U.S.C. 7217(b) (424 F. Supp. 631-632). The trial court sentenced petitioner to a 30-day prison term (Mot. 11).[1] The court of appeals affirmed by judgment order (Pet. App. 26-28).

The pertinent facts were encompassed in stipulated testimony and exhibits and may be summarized as follows: In 1975, petitioner and his wife were the sole shareholders of National Credit Bureau, Inc. (NCB), a collection agency doing business in Portland, Oregon. Petitioner was a director and officer of NCB, but he did not take an active role in day-to-day management of the business. On April 4, 1975, Internal Revenue Service agents went to the business offices of NCB to collect assessed and unpaid taxes from the corporation. After being advised that NCB did not have sufficient funds with which to pay the taxes, the agents conducted an inventory of NCB's office. Pursuant to their authority under 26 U.S.C. 6331, the agents thereupon levied upon the corporation's business equipment, including desks and typewriters located on the business premises, by installing locks on the office entrances and attaching warning notices to the windows, which advised of the Service's seizure for nonpayment of taxes. The notices stated that

[1] "Mot." refers to petitioner's motion for leave to file the petition out of time.

"All persons are warned not to remove or tamper with the property, in any manner, under severe penalty of the law" (424 F. Supp. at 632 & n.1).

Petitioner learned of the levy late in the afternoon of April 4, a Friday. The next day he went to the NCB office and observed the warning notices and locks affixed by the Internal Revenue Service. He proceeded to remove the locks, gain entrance to the premises, and remove the notices. Petitioner thereafter engaged a locksmith to install new locks on the office. About ten days later, NCB paid its tax arrearages in full and the Internal Revenue Service released its levy (424 F. Supp. at 632).

In the district court, petitioner's brief stated: "Now charged with violation of 26 U.S.C. §7212(b), Mr. Johnson freely acknowledges that he violated the letter of that statute with full knowledge of the possible consequences" (footnote omitted). The district court accordingly found that petitioner made "repeated and voluntary admissions that he committed the acts alleged in the indictment * * *" (424 F. Supp. at 632).

ARGUMENT

1. The court of appeals correctly affirmed petitioner's conviction under 26 U.S.C. 7212(b) for forcible rescue of property subject to an Internal Revenue Service levy.

Petitioner first attacks (Pet. 8-25) the constitutionality of the levy procedures of 26 U.S.C. 6331 on the ground that they fail to provide for notice and adversary hearing prior to seizure, where the levy may effect "a deprivation far in excess of the assessments" (Pet. 18). But as the court of appeals observed (Pet. App. 27 n.(a)), this Court has consistently upheld the Treasury's summary seizure power to collect the revenue without a pre-seizure hearing as conforming with the requirements of procedural due process. See *Phillips* v. *Commissioner*, 283 U.S. 589 (1931); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 (1972). See

also *Tavares* v. *United States*, 491 F. 2d 725 (9th Cir. 1974), cert. denied, 420 U.S. 925 (1975); *United States* v. *Heck*, 499 F. 2d 778 (9th Cir.), cert. denied, 419 U.S. 1088 (1974); *United States* v. *Pilla*, 550 F. 2d 1085 (8th Cir.), cert. denied, 432 U.S. 907 (1977).[2] In *Commissioner* v. *Shapiro*, 424 U.S. 614, 630 n.12 (1976), the Court reaffirmed this proposition, stating that the need to collect the revenue justifies the government's summary seizure power without a pre-seizure hearing as long as the taxpayer has an opportunity for prompt post-seizure inquiry into the basis for the Commissioner's claim. See also *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977).

2. Petitioner also contends (Pet. 25) that his conviction for forcible rescue of property is barred by this Court's decision in *G.M. Leasing Corp.* v. *United States, supra*. In petitioner's view, the agents' failure to obtain a search warrant prior to their levy upon NCB's property justified his removal of the locks and warning notices and the installation of new locks.

But *G.M. Leasing* does not involve comparable conduct and does not, in any event, speak to the validity of a conviction for forcible rescue of property. There, the Court held that the warrantless forcible entry by Internal Revenue Service agents into a corporation's office and removal of property for purposes of collection of taxes violated the Fourth Amendment. The Court therefore remanded the case for consideration of the corporation's claim to money damages against the individual agents in light of the government's assertion that the agents had acted in good faith. Here, on the other hand, the agents did not forcibly enter NCB's private premises or remove any property. They simply visited its offices during

[2]Contrary to petitioner's assertion (Pet. 8-14), this Court has upheld the validity of a pre-hearing seizure of property in satisfaction of an outstanding tax liability where collection of the tax is not in jeopardy. See *Springer* v. *United States*, 102 U.S. 586, 593-594 (1880).

normal business hours, and, after visually surveying the property, installed locks on the entrances and placed seizure notices on the windows. There is accordingly nothing in the record to suggest that any aspect of the agents' conduct constituted an invasion of privacy that would implicate the warrant requirement of the Fourth Amendment.

At all events, even if the agents should have obtained a warrant, their failure to do so did not justify petitioner's subsequent removal of the locks and seizure notices and his installation of new locks. Contrary to petitioner's contention, the courts have uniformly held that, in order to obtain a conviction for forcible rescue of property under 26 U.S.C. 7212(b), the government need only show that the property was seized by a person authorized to do so by virtue of his office. Thus, the defendant's appropriate course of action in response to a levy he believes is unlawful is not to repossess the property but to bring a civil proceeding attacking the seizure. See, *e.g.*, *United States* v. *Harris*, 521 F. 2d 1089, 1092 (7th Cir. 1975); *United States* v. *Oliver*, 421 F. 2d 1034, 1036-1037 (10th Cir. 1970); *United States* v. *Scolnick*, 392 F. 2d 320, 326 (3d Cir.), cert. denied, 392 U.S. 931 (1968); *United States* v. *Bernstein*, 287 F. Supp. 84, 86-87 (S.D. Fla. 1968). As the court stated in *United States* v. *Harris, supra*, 521 F. 2d at 1092, "[i]f the rule were otherwise it would 'encourage violent self-help where civil remedies are admittedly available' " (quoting *United States* v. *Scolnick, supra*, 392 F. 2d at 326).[3]

[3]Forcible rescue cases are analogous to prosecutions for assaults on federal officers. In those cases, the courts have uniformly rejected the proposition that a private individual may, by resisting, decide how federal officers—acting within the scope of their authority—should carry out their duties. See, *e.g.*, *United States* v. *Johnson*, 542 F. 2d 230 (5th Cir. 1976); *United States* v. *Cunningham*, 509 F. 2d 961, 963 (D.C. Cir. 1975); *United States* v. *Moore*, 483 F. 2d 1361, 1634-1365 (9th Cir. 1973); *United States* v. *Jansen*, 475 F. 2d 312, 318 (7th Cir.), cert. denied, 414 U.S. 826 (1973); *United States* v. *Ferrone*, 438 F. 2d 381, 389-390 (3d Cir.), cert. denied, 402 U.S. 1008 (1971).

Cooper v. *United States*, 299 F. 483 (3d Cir. 1924), upon which petitioner relies (Pet. 8), does not support his assertion that a person cannot be prosecuted for a forcible rescue of seized property if the seizure would be invalid under a subsequently announced standard. While *Cooper* states that "lawful seizure is not only an ingredient preliminary to an unlawful rescue but it is a prerequisite" and that "the lawfulness of the seizure must be shown" (299 F. at 484), the Third Circuit, citing its earlier decision in *Cooper*, subsequently observed that "[o]ne way for the Government to establish a lawful seizure is to show that the property was seized by a person authorized to do so by virtue of his office." *United States* v. *Scolnick, supra*, 392 F. 2d at 326. Here, petitioner cannot dispute that the revenue agents who installed the locks and attached the seizure notices to petitioner's property were fully authorized to do so. *G.M. Leasing* therefore does not bar petitioner's conviction for forcible rescue of property.[4]

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[4]Even on the assumption that a person cannot be prosecuted for a forcible rescue of property when the government's original entry and seizure is made without a search warrant as required by *G.M. Leasing*, petitioner's reliance on *G.M. Leasing* erroneously assumes that the decision in that case, which was rendered more than a year after the levy here, should be applied retroactively. But the privacy interests that the Court sought to uphold in *G.M. Leasing* would not be served by applying the decision retroactively to the instant case. See, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531, 535-536 (1975); *Desist* v. *United States*, 394 U.S. 244, 249-250 (1969); *Linkletter* v. *Walker*, 381 U.S. 618, 636-637 (1965); *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967). Here, the entry and seizure fully conformed to the longstanding prior Internal Revenue Service procedure under which a warrant was not thought to be required for entry on a taxpayer's premises for the purpose of seizing property to collect delinquent taxes. See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855); see also *G.M. Leasing Corp.* v. *United States*, *supra*, 429 U.S. at 349-353; *United States* v. *Pilla*, *supra*, 550 F. 2d at 1091-1092.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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